

United States
Circuit Court of Appeals *4*

For the Ninth Circuit.

In the Matter of EARL N. McKINNEY, Bankrupt.
WILLIAM COWAN,

Appellant and Petitioner,

vs.

JOHN P. CULL, as Trustee in Bankruptcy in the
Matter of EARL N. McKINNEY, Bankrupt,
Appellee and Respondent.

JOSEPH F. SEYMOUR, of El Centro, *Amicus*
Curiae, Counsel for the Bankrupt by
Permission of the Court granted
May 8, 1923.

BRIEF AND ARGUMENT OF BANKRUPT.

JOSEPH F. SEYMOUR,
Attorney for the Bankrupt,
by Permission of the Court.

FILED
MAY 21 1923
U. S. DISTRICT COURT
SOUTHERD DISTRICT OF CALIF.

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Brief and Argument of Bankrupt.

The court has before it the Transcript of Record and the Briefs of the Appellant and Respondent.

Now comes the Bankrupt, Earl N. McKinney, by and through his attorney, Joseph F. Seymour, and makes this presentment to this Honorable Court, permission having been first obtained so to do in open court on May 8, 1923.

On page 9 of Appellant and Petitioner's Brief we find the following:

The Court, In re Wood, 278 Fed. 355, says:

"It is within the power of the bankruptcy court to assert and exercise a summary power over the property of a bankrupt or even of third persons holding property and claiming title, *provided* such claim is merely colorable or fraudulent. But inasmuch as such proceedings deprives a person of the usual due process of law, a summary order directing its surrender should be based upon facts which no fair mind can dispute."

On page 38 of Transcript of Record, in the special report of the Trustee, we find the following:

"That it looks to the Trustee that much of the property taken over by Cowan is not covered by any existent mortgage, as much of the personal property had been sold and changed by mortgagor after the execution of the mortgages as testified by bankrupt, and from all that the trustee can gather that Cowan is in possession of all this property without authority of law, *and has converted the same to his own use unlawfully*, and that a considerable sum ought to be recovered from Cowan on an accounting, for the benefit of the general unsecured creditors, and the trustee recommends that an action be instituted against said Cowan for an accounting in the Superior Court of Cochise County, Arizona."

On page 45 of the Transcript of Record, in the special report of Trustee, we find the following:

“That under said judgment so obtained by collusion and misunderstanding by and between Cowan and McKinney in this respect that McKinney at no time in the transaction knew what his legal rights were as a mortgagor, and was led to believe by Cowan and his attorney that Cowan as mortgagee could at any time and at his option take over all the property claimed under the mortgages and thereby induced McKinney to turn over the bankrupt's property to Cowan on the 1st day of November, 1917, with the agreement that McKinney was to run the business and as soon as Cowan received sufficient from the business to liquidate his claims then the property was to be turned back to McKinney, and during the time McKinney was running the business, he was to receive a salary, and under which arrangement McKinney did give his time and work aided by his experience, to the business from Novr. 1st, 1917, to April 1st, 1918, five months, and during said time all the proceeds were turned to Cowan, and McKinney received little or nothing for his work, and in the meantime this suit was started against McKinney and the latter without legal advice, and in collusion with Cowan and his attorney induced McKinney to make the confession and agreements (page 4) for the judgment as was finally entered in the said case of

Cowan vs. McKinney, and therefore *I allege and charge that such judgment was fraudulent as to the general creditors.*”

On pages 29, 30 of the Transcript of Record, testimony of the bankrupt, we find the following:

“I turned in all money from the business to Benshimol and he was to pay all bills. No account was ever rendered to me but I understood the ranch account was carried in the name of William Cowan, mortgagee, by David Benshimol, attorney, (20) and the moneys collected deposited in the First National Bank of Douglas, Arizona. The average monthly receipts of the business at the time I turned it over to Cowan was from twelve to fifteen hundred dollars a month. The expenses ran about the same.

When I turned over all my property to Cowan in November, 1917, the cattle were not counted, but at that time I had between two hundred and two hundred and fifty head of cattle. About one hundred milk cows, and about one hundred and fifty range cattle.

I never gave a bill of sale for anything. Cowan said the property was all his and I supposed it was. He had a mortgage over everything. He offered to cancel everything but never did. I never gave him a bill of sale or deed for the property.”

On page 31 of the Transcript of Record, testimony of the bankrupt, we find the following:

"As to my financial affairs, I will state that I wanted to go into bankruptcy before I turned over my property to Cowan but neither Cowan nor Benshimol would consent to it and Cowan left it to Benshimol to take care of my creditors. They began to get rid of me the last of March, 1918, when Kirkland was sent out to the ranch."

On page 33 of Transcript of Record, testimony of the bankrupt, we find the following:

"I wanted to take bankruptcy proceedings in November, 1917, as I have testified, but both Cowan and Benshimol insisted that I should not go into bankruptcy. Benshimol said I must (23) wait until after the four months had expired. I do not know why but I understand Cowan would then get everything. Cowan never asked me for a bill of sale or deed. I thought he had a right to take everything under his mortgages. Cowan knew I had other creditors, and talked about them on numerous occasions. He said he did not care what became of my other creditors. Benshimol during all this time was Cowan's attorney, he was not mine. He claimed to be working for Cowan."

On pages 84, 85 of Transcript of Record, referee's findings of fact and conclusions of law, we find the following:

"That the Trustee has charged that Cowan failed to give credit to the bankrupt, for checks

sent him on sales of cattle made by the bankrupt, and failed to give credit to the bankrupt for different properties taken over by Cowan, and so under said charges and allegations of the Trustee I on or about the 12th day of Dec., 1919, had Cowan subpoenaed to appear before me on December 22d, 1919, at Douglas, Arizona, for examination, where he, Cowan, appeared and submitted to examination by myself and from such examination I found that during the year 1916 the bankrupt had sold stock presumably covered by Cowan's mortgages in the sum of \$2,424.50, which the Bankrupt Cowan admitted had turned over to him said amount of \$2,424.50 from such sales of stock and in an examination of Cowan he could only show where he had credited the bankrupt with the sum of \$1158.92, leaving a balance unaccounted for which Cowan admitted he had received of \$1265.58."

As appears from the files and records in this case the Appellant and Petitioner, Cowan has used every means possible to further his claim. We find the Trustee and Referee disagreeing with him. We find him appealing from the decision to the District Court of the United States for the District of Arizona. We find that Court disagreeing with Mr. Cowan and agreeing in the findings of fact and conclusions of law made by the Referee, affirmed. We find the opinion of this Honorable Court just referred to, as set forth in the minutes of said court.

On pages 175, 176 of the Transcript of Record we find the following:

“May, 1922, Term—Tuesday, September 6, 1922.—
Tucson.

In the District Court of the United States for the
District of Arizona.

Honorable WILLIAM H. SAWTELLE, United
States District Judge, Presiding.

Minute Entry.

B—31.

In the Matter of EARL N. McKINNEY, Bank-
rupt.

Minutes of Court—September 5, 1922.

ORDER AFFIRMING REFEREE'S FIND-
INGS OF FACT AND CONCLUSIONS OF
LAW.

The petition of William Cowan, filed herein July 19, 1921, having submitted to the Court, and by the Court taken under advisement, and the Court, having fully considered the same, does now order that the petitioner's motion to dismiss for want of jurisdiction in the Referee or this Court be, and the same is, hereby overruled, the Court being of the opinion that the Referee was within his rights and proceeded lawfully in instituting summary proceedings referred to in the *the* said petition, and that it was not necessary that the matters and things referred to in said petition be determined in a plenary action;

IT IS THEREORE ORDERED, ADJUDGED AND DECREED that the findings of fact and conclusions of law made by the Referee be, and the same are, hereby affirmed.

IT IS FURTHER ORDERED that the Clerk send papers and records in this case back to the Referee for further proceedings in accordance with this decision. (132)"

We are now presented with the appeal and petition in this Court.

As to the jurisdiction of the bankruptcy court to adjudicate in a summary proceeding, we find in *Re Ellis Bros. Printing Co.*, 156 Federal, 430, the Court holding in substance as follows:

"The claim of an attorney who as such collected money for a bankrupt before the bankruptcy of the right to retain such money and to apply it on an indebtedness from the bankrupt to him, is not *not* such an adverse claim of title as to deprive the bankruptcy court of jurisdiction to adjudicate such claim in a summary proceeding, therefore, by the trustee."

We cite, also, *In re Howard Laundry Co.*, 203 Federal, 445. *Bryan vs. Beranheimer*, 181 U. S. 188.

We find the Court holding in *Re Friedman*, 161 Federal, 260: The District Court had jurisdiction in a bankruptcy proceeding to make a summary order directing third persons to pay over to the temporary receiver sums of money which they claimed they did not have or which they claimed were their own property.

The bankrupt has no complaint to make of either the Trustee, the Referee, or their Attorney. He simply seeks to draw to the Court's attention in his humble way a few facts as evidenced by the record and a few cases in support of the Trustee's position and in opposition to the Appellants. Time prevents a more elaborate and extensive discussion. That the holding of the Court that the summary action followed was proper is, in our opinion, ably supported by the authorities and was correct. That the conduct of Mr. Cowan cannot be approved is absolutely supported by the record in this case.

Respectfully submitted,

EARL N. McKINNEY,

Bankrupt.

By JOSEPH F. SEYMOUR,

Of El Centro, California,

Attorney for the Bankrupt, by Permission of the Court.

